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Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 63.

MARTHA I. HUNT, PLAINTIFF IN ERROR,

vs.

THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, DEFENDANT.

BRIEF IN BEHALF OF DEFENDANT.

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Attorney for Defendant.

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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THE SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY, DEFENDANT.

BRIEF IN BEHALF OF DEFENDANT.

This is a writ of error to review the judgment of the Court of Appeals of the District of Columbia, affirming the judgment of the Supreme Court of the District of Columbia, overruling the plaintiff's demurrer to certain pleas filed by the defendant company in an action upon a certain policy of insurance issued by the defendant to the plaintiff insuring against loss or damage by fire certain furniture and other personal property in her residence, number 1636 Sixteenth street N. W., in the city of Washington, D. C.

The declaration (Rec. p. 1), alleged that on February 2, 1901, the defendant company issued to the plaintiff a certain policy of insurance in consideration of the stipulations therein recited and the payment by her of the sum of fifteen dollars as a premium, whereby it insured the plaintiff for the term of one year against loss or damage by fire to an amount not exceeding $5,000; that at the time of issuing said policy and until it was damaged by fire the plaintiff was possessed, as sole owner, of said insured property; that on or about

February 16 and February 17, 1901, the said insured property was destroyed by fire, whereby the plaintiff sustained loss and damage to the extent of $5,000; that the plaintiff had performed and observed all of the stipulations and conditions of the policy and had made proofs of the loss in accordance therewith, but the defendant had refused to pay the loss or any part thereof.

To this declaration the defendant filed seven pleas. The plaintiff demurred to the fifth and sixth pleas, and moved to strike out the second and fourth pleas. The latter motion was granted; but the demurrer to the fifth and sixth pleas was overruled (Rec. p. 5). The plaintiff elected to stand upon the demurrer, whereupon judgment was entered in favor of the defendant and against the plaintiff, from which judgment the plaintiff appealed to the Court of Appeals where the judgment was affirmed.

The pleas sustained by the court are set out (Rec. p. 4). The fifth plea was that:

> "By said policy of insurance it was provided that if the subject-matter of the insurance should be personal property the said policy should be void if said property should be or become encumbered by a chattel mortgage, and, in fact, the subject of insurance in said policy was wholly personal property, and that the same was encumbered by certain chattel mortgages, as more specifically set forth in plea numbered four."

As set out in said plea numbered four it was alleged (Rec. p. 3) that the plaintiff had conveyed said property or a part thereof by four certain deeds in trust therein described to secure the payment of certain specified sums of money in the fall of the year 1900, a few months before procuring the policy of insurance from the defendant.

The sixth plea (Rec. p. 4) alleged that—

> "the subject of insurance in said policy was wholly personal property, and after the execution of said

policy, to wit, on February 7, 1901, the said plaintiff executed a chattel mortgage, whereby she encumbered the personal property or part thereof covered by said policy of insurance, and conveyed the same by deed dated February 7, 1901, which was recorded on the same day in Liber 2533, folio 322, of the land records of the District of Columbia, sa'd deed being in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars ($420) with interest, the property covered by said deed of trust being more particularly described in a paper annexed to said deed as recorded and marked Schedule 'A.'"

Motion to Dismiss for Want of Jurisdiction.

The defendant moves to dismiss the writ of error herein because the matter in dispute does not exceed $5,000. The Code of Law for the District of Columbia provides as follows:

> "Sec. 233. Any final judgment or decree of the Court of Appeals may be reexamined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all cases in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as existed in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia on February ninth, eighteen hundred and ninety-three, and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."

The matter in dispute was the payment of a $5,000 policy of fire insurance. The declaration claimed (Rec. p. 2) "that the plaintiff sustained loss and damages, to wit, $5,000." This was the matter in dispute; and because the plaintiff

claimed in the *ad damnum* clause of her declaration $5,012.50,

> "being the total amount of the policy and ~~$1,250~~ interest on the same from June 2, 1901, to June 17, 1901, together with interest thereon from June 17, 1901,"

the matter in dispute was still the payment of $5,000, notwithstanding the plaintiff claimed interest. The interest was not the "matter in dispute;" it was a mere incident thereto. If the plaintiff was entitled to recover under the policy the $5,000 the interest would be allowed not as a part of the "matter in dispute" but as damages for the detention of the claim.

> "It was decided in Lee *vs.* Watson, 1 Wall, 339 (68 U. S. 558), that 'in an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration, and not merely the damages alleged or the prayer for judgment at its conclusion, must be considered in determining whether this court can take jurisdiction on a writ of error sued out by the plaintiff.' Such is now the established rule."
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> Schacker *vs.* Ins. Co., 93 U. S. 241.
> Gray *vs.* Blanchard, 97 U. S. 565.
> Tinstman *vs.* Nat. Bank, 100 U. S. 6.
> Hilton *vs.* Dickinson, 108 U. S. 165.
> Bkg. Asso. *vs.* Ins. Asso., 102 U. S. 121.
> Webster *vs.* Buffalo Insurance Co., 110 U. S. 385.

Interest is considered in determining appellate jurisdiction only in cases (1) where judgment has been rendered with interest, or (2) where the action was *ex contractu* and special provision had been made in the contract itself for the interest claimed in the declaration.

In the case at bar there has been no judgment on the merits nor is there any provision in the contract sued upon for payment of interest.

ARGUMENT FOR DEFENDANT ON THE MERITS.

There Was a Breach of the Contract of Insurance by the Plaintiff, Which Disentitled Her to Recover.

It was argued in plaintiff's brief below that the question for determination was whether there is not a distinction in the condition in the policy of insurance between a "chattel mortgage" and "a deed in trust," the provision in the policy of insurance being that the "policy should be void if the said property should be or become encumbered by a chattel mortgage." That question, it is respectfully insisted, is not before the court on the record in this case, because the fifth plea alleges that the property "was encumbered by certain chattel mortgages," and the allegation of the sixth plea is that after the execution of the said policy the plaintiff executed a "chattel mortgage" on the property and conveyed the same—

> "by deed in trust to secure the payment to D. R. McNaught of the sum of four hundred and twenty dollars, with interest."

This is descriptive of a chattel mortgage pure and simple. Where is there anything anywhere in this record which would justify the court in holding that any of the encumbrances mentioned in said pleas were not chattel mortgages? The plaintiff by her demurrer admitted that they were such.

The contention of the plaintiff is that there are clear distinctions between a mortgage and a deed in the nature of a mortgage, and that the condition in the policy of insurance relates exclusively to a mortgage; that the creditor secured by a chattel mortgage has the legal title and right of possession, unless there be some condition in the mortgage by which the mortgagor or debtor remains in possession until default; while the creditor or *cestui que trust* would never be entitled, under any circumstances, to the possession of the

chattels conveyed by the instrument to the trustees. This is an entirely inadequate statement. Mortgages not unusually contain a provision for the mortgagor to remain in possession, and they very frequently contain a power of sale, and almost universally the mortgagor remains in possession.

Counsel for the plaintiff has exhibited no case in which any court has held that such a condition as the one in this policy of insurance is not violated by a chattel deed of trust, or that there is any distinction under that condition between a chattel mortgage and a chattel deed of trust. The cases cited below did not support any such proposition.

The condition of the policy of insurance here sued on was that the policy should be void if the property should be or become encumbered by a chattel mortgage; such a condition was not contrary to law and it was entirely competent for the parties to the contract to so stipulate. Such a valid condition if broken constitutes a bar to the plaintiff's action and defeats any recovery on the policy.

This was admitted below by the plaintiff and it is understood that there is no claim otherwise now.

The court below had specifically so held in Dumas *vs.* Insurance Co., 12 Apps. D. C. 245.

That case was an action on a "standard" policy of insurance, the provisions of which were identical with the policy in suit, namely:

> "That it should be void if the insured had concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or if the interest of the insured in the property were not truly stated in the policy, or in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after loss. And that unless otherwise provided by agreement endorsed upon the policy, it should be void if the insured should make any other contract of insurance on the property covered by the said insurance, or

> any part of it, or if the interest of the insured were other than unconditional and sole ownership, or if, the subject of the insurance being personalty, were or became encumbered by chattel mortgage, or if, with the knowledge of the insured, foreclosure proceedings were commenced, or notice of sale were made of any of the property by virtue of a mortgage or trust deed."

The insurance company claimed there, as here, that there was a breach by the appellant of the contract of insurance because, among other things, the appellant was not the unconditional and sole owner of the property and because the property was encumbered "by a chattel mortgage or deed of trust," whereby—

> "the plaintiff had conveyed a part of said property to Henry F. Woodard by deed dated January 31, 1896, which was recorded on the 31st day of February, 1896, in Liber 2093, folio 152, of the land records of the District of Columbia, said deed being a deed in trust to secure the payment to the firm of Craig & Harding of the sum of $671.01," etc.

The court in its opinion said:

> "Courts have sometimes been too astute in their search for reasons to maintain the liability of insurance companies in the face of conditions limiting such liability. And yet a contract of insurance in this regard is no different from other contracts; and the function of courts is to construe them, not to make them. In the absence of statutory provisions to the contrary, insurance companies have the same rights as individuals to limit their liability and to impose whatever conditions they please upon their obligations not inconsistent with public policy; and the courts have no right to add anything to their contracts or to take anything from them. If those contracts contain harsh and onerous conditions which perhaps a court of equity might not enforce, if called on so to do, yet there is no compulsion, either legal or

moral, on parties to deal with them upon the basis of such conditions. And certainly it would be a novel contention for parties to seek to enforce liability under such contracts in a court of common law, and at the same time to repudiate the express conditions upon which such liability is made to depend.

"We must take it for granted, therefore, that our duty in the premises is to construe the contract of insurance before us according to its true legal intent and meaning, and not in any manner to vary or modify the instrument itself by disregard of any of its provisions. It is true, however, that this construction must be with reference to the well established rule that, if a policy of insurance is so drawn as to require interpretation and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. Imp. Fire Ins. Co. *vs.* Coes County, 151 U. S. 452. . . . It may be that it was in consequence of such decisions of the courts as those to which we have referred, wherein it was held that there was sole and unconditional ownership, in the legal sense of the policy of insurance, notwithstanding the existence of an outstanding mortgage, that insurance companies sought further to limit their liability by imposing conditions against such mortgages. But whatever may have been the suggestion for these conditions, it is very certain that they add limitations to the policy beyond that of sole and unconditional ownership, which we can not disregard. It was the right of the company in this case to refuse to insure mortgaged property, and to provide that its policy of insurance, however otherwise conditioned, should not cover personal property encumbered by a chattel mortgage. . . . The parties have deliberately put into their contract and have made it an essential condition of that contract that the contract itself should not be binding, if there was any mortgage on the property or the title was not that of unconditional ownership. There was no inhibition by the law against the insertion of such a condition in the contract; and it may

> well be that its insertion was a matter of precaution, to guard as well against the negligence or failure of agents to elicit proper information, as against the negligence or failure, not fraudulent, of persons seeking insurance to give such information. The condition is not illegal and does not contravene any rule of public policy; and even if its practical effect should be held to be to throw upon the insured party the burden of giving voluntarily the information which otherwise the insurer would have been required to elicit by proper inquiry, we know of no rule of law that would preclude parties from contracting to that effect, if they so desire."

The court further held that the policy of insurance being a single, entire, and indivisible contract was invalidated by the forfeiture.

This court has held that where the averment in the application for insurance is that the statements and declarations made therein are in all respects true, and the policy is made and accepted upon the express condition and agreement that such statements and declarations are in all respects true, this stipulation is not made as to important or material statements only, but as to all statements; and it is no answer that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. A false answer to an inquiry, whether the applicant has made any other application to have his life insured and whether he is married or single was held to avoid the policy.

Jeffries *vs.* Econ. Mut. Life Ins. Co., 22 Wall. 47.

The rule of construction is settled by this Honorable Court.

Said Mr. Justice Jackson, in Imperial Fire Ins. Co. *vs.* County of Coes, 151 U. S. 461:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies embodying the agreement of the parties.

For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured can not bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within those terms; and if it appears that the contract has been terminated by the violation on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured can not recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms, conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made. It is settled as laid down by this court in Thompson *vs.* Phenix Ins. Co. of Brooklyn, 136 U. S. 287, that, when an insurance contract is so drawn as to be ambiguous, or to require interpretation, or to be fairly susceptible of two different constructions, so that reasonable men on reading the contract would honestly differ as to the meaning thereof, that construction will be adopted which is most favorable to the insured.

"But this rule is equally well settled that *contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and if they are clear and unambiguous, their terms are to be taken and understood in their plain, ordinary, and popular sense.*"

Apply this rule of construction to the case at bar, and what becomes of the plaintiff's contention?

It is well settled that in the District of Columbia there is no recognized difference between deeds of trust and mortgages. In Middleton *vs.* Parke, 3 App. D. C. 149–164, Mr. Justice Morris, delivering the opinion of the court, said:

> "The deed of trust is the only form of mortgage that has been in general use in the District of Columbia for many years. The common law mortgage is practically unknown with us; *and everyone understands that, when a mortgage of real estate here is spoken of, the deed of trust is what is intended. . . . The deed of trust is here used as the equivalent of mortgage; and so the term is universally used by the community.* Indeed, while a mortgage is not necessarily perhaps a deed of trust, a deed of trust to secure the loan of money is necessarily a mortgage."

It is respectfully submitted that the Maryland cases relied on by plaintiff are inapplicable to the question here involved, and even if they were they do not constitute authority in the District of Columbia.

Mr. Justice Shepard, speaking for the Court of Appeals of the District of Columbia, in affirming the judgment overruling the demurrer to the pleas (20 Apps. D. C. 48), said:

> "But the contention is, that the terms of the condition must be strictly construed, resolving all doubts in favor of the insured; and that so construed there is a distinction at law, to which effect must be given, between the chattel mortgage therein mentioned and a chattel deed in trust as described in the plea.
>
> "The argument in support of this contention is ingenious, but it lacks substantial foundation. There is no ambiguity in the language of the condition set out in the policy. Its plain purpose is to guard against the encumbrance of the insured personal property without the knowledge and consent of the insurer, whether it be by way of a technical chattel mortgage simply, by such a mortgage

with power of sale in the mortgagee, or by a conveyance in trust to third persons with similar power of sale in case of the default of the mortgagor. Each is a chattel mortgage within the ordinary meaning of the term (Middleton vs. Park, 3 App. D. C. 149, 164). That case was an action of ejectment to recover the possession of land that had been sold under a deed of trust executed by a guardian under the authority of the equity court. The authority given was to 'mortgage' the land. The case turned upon the contention, which was denied, that the power to 'mortgage' did not authorize a security by conveyance in trust. That contention had more plausible foundation than the one in the case at bar."

No reasonable rule of construction, however strict, would justify the plaintiff's contention that a chattel deed of trust was not within the condition of the policy of insurance in this case; it is both within the letter and the spirit of the condition; and it is respectfully submitted that there is no error in the record and the judgment below should be here affirmed.

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